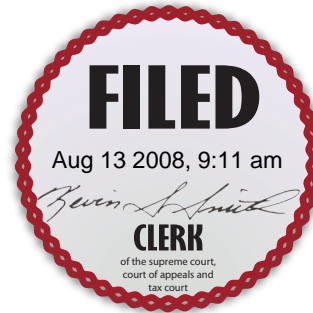


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JERALD ANTHONY MINZEY,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 50A03-0802-CR-41

APPEAL FROM THE MARSHALL SUPERIOR COURT
The Honorable Robert O. Bowen, Judge
Cause No. 50D01-0501-FC-4

August 13, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Jerald Anthony Minzey challenges the sufficiency of the evidence demonstrating he was on probation at the time he was arrested, the discretion of the trial court in revoking Minzey's probation, and the trial court's imposition of his previously suspended sentence. We affirm.

Issues

Minzey raises two issues, which we restate as follows:

- I. whether there was sufficient evidence to support the trial court's findings that Minzey was on probation at the time of his arrest and that he violated his terms of probation; and
- II. whether the trial court abused its discretion in revoking Minzey's probation by imposing the remainder of his suspended sentence.

Facts

In August of 2005, Minzey was convicted of operating a motor vehicle after forfeiture for life as a Class C felony. He was sentenced to a four-year term, with one year executed and three years suspended to probation. The terms of probation included the following:

I shall not violate any city, state, or federal laws. If arrested, I shall notify my Probation officer within 24 hours I shall not purchase, possess, or consume any intoxicating beverage. I shall not enter any facility where intoxicating beverages are sold, as a primary commodity (i.e., any liquor store, tavern or bar) I hereby agree to abide by the terms of my probation and understand that a violation of any one of these conditions may be considered sufficient cause to revoke my probation

App. p. 45.

Minzey served his one year at the Department of Correction and began serving his three years of probation. Minzey failed to meet many terms of his probation including refusing to submit a urinalysis on October 24, 2006, and refusing to report for drug screens, both on October 25 and 26, 2007. The State filed a petition to revoke his probation on October 30, 2006. A hearing was set for November 22, 2006, but Minzey wrote a letter to the court and requested a later court date due to problems with transportation. After several pre-trial conference entries and two amended petitions to revoke Minzey's probation, a hearing finally took place on June 20, 2007. As a result of Minzey's violations, the trial court ordered him to serve forty days at the Department of Correction. The order stated Minzey's probation would terminate upon completion of the forty-day sentence. The trial court ordered Minzey to report to the Department of Correction on July 20, 2007, at 6:00 p.m.

On June 28, 2007, Minzey's probation officer received an anonymous phone call alerting him that Minzey had been arrested on June 27, 2007, for operating a motor vehicle while intoxicated ("OWI"), and that he was at the St. Joseph County Jail. The officer called the jail, but the jail had no record of Minzey's arrest. The probation officer investigated, and a few days later discovered Minzey had used a fictitious name when arrested. Minzey never notified his probation officer of his arrest. The State subsequently filed a second motion to revoke Minzey's probation alleging he was charged with battery as a Class A misdemeanor, two counts of operating a vehicle while intoxicated as Class A and Class C

misdemeanors, false informing, operating while never licensed, and failing to notify his probation officer within twenty-four hours of his arrest.

At the hearing Minzey claimed he did not think he was on probation at the time of the arrest for the OWI. The trial court ordered execution of the remainder of the original sentence. Minzey now appeals the second revocation of his probation and the execution of the remainder of the original sentence.

Analysis

I. Sufficiency of Evidence

Minzey challenges the sufficiency of the evidence establishing whether he was on probation at the time of his most recent arrest. The State is required to prove a violation of probation by a preponderance of the evidence. Ind.Code § 35-38-2-3(e); see also Washington v. State, 758 N.E.2d 1014, 1017 (Ind. Ct. App. 2001). We view the evidence in a light most favorable to the State and will affirm a revocation if substantial evidence of probative value supports the trial court's decision. I.C. § 35-38-2-3(e); see also Washington 758 N.E.2d at 1017. "If there is substantial evidence of probative value to support the trial court's conclusion that a defendant has violated any terms of probation, we will affirm its decision to revoke probation." Kelnhofer v. State, 857 N.E.2d 1022, 1023 (Ind. Ct. App. 2006) (emphasis added).

Minzey claims he understood the trial court told him he was no longer on probation after the first revocation hearing, and therefore there is insufficient evidence to demonstrate he actually was on probation at the time of his arrest on June 27, 2007. The following dialogue took place at the second probation revocation hearing:

[Prosecutor]: And were you aware of the term of probation here in Marshall County that required you to notify a probation officer if you got arrested somewhere else?

[Minzey]: Respectfully, sir, after I was sentenced, [Judge Bowen] at that time told me that the probation did not do me any good and I was to turn myself in and at the time I was done with it.

[Trial Court]: Do you have anything you want to add to that?

[Minzey]: Respectfully, sir, I did exactly as you asked and told me to do, sir. Unfortunately, I did get myself into a little bit of trouble afterwards, but I can't see for what you've told me that – how I violated my probation in anyway [sic] because you told me that my probation was done and the way I perceive the law is after I've been sentenced everything stops there and we move no and I am paying for it in St. Joe [sic] County, sir.

[Trial Court]: Okay. And the Order was that upon completion of that sentence that I gave you then probation would terminate; right?

[Minzey]: The way I took it sir, you said that probation didn't do me any good.

[Trial Court]: I don't recall saying that but go ahead.

Tr. pp. 11-12

Conversely, Minzey's Order from his probation revocation hearing and the abstract of judgment from the Department of Correction both state Minzey's probation would terminate when he was done with his forty-day sentence. App. pp. 68-69. There is also evidence Minzey knew he was still on probation when he was arrested on June 27, 2007 as indicated by the following testimony:

[Palmer]: Can you tell us what this is?

[Probation Officer]: This is the reporting sheet or address change sheet that we use when somebody comes down from court. . . .

[Palmer]: And when was this form filled out?

[Probation Officer]: 6-20 of '07.

[Palmer]: And there's some handwriting on that form. Whose handwriting would that be?

[Probation Officer]: I believe it appears to be what – it looks like Mr. Minzey's.

[Palmer]: Okay. And that's the form he filled out on that day after court?

[Probation Officer]: It would have been.

* * * * *

[Palmer]: Would you read us that paragraph across the bottom there where it asks Mr. Minzey as to what his disposition was that day?

[Probation Officer]: It says 'sentenced to 40 days DOC and to pay all fine and costs, probation finished when sentence is completed.'

Tr. pp. 14-15 (emphasis added).

Minzey asserts there is ambiguity due to his confusion whether he was on probation, and for that reason the State has not established by a preponderance of the evidence that Minzey was actually on probation on probation at the time of his arrest. We disagree. Upon review of the transcript of the first probation hearing, we cannot find any facts that support Minzey's claim the Judge told him probation "didn't do [him] any good," and that he was "done." Tr. pp. 11-12. Notwithstanding that, there is no ambiguity in the order from

Minzey's probation revocation hearing, the abstract of judgment from the Department of Correction, or the probation fact sheet. There is sufficient evidence Minzey was on probation at the time of his arrest on June 27, 2007.

Minzey also argues there is insufficient evidence that Minzey violated the terms of his probation because he was incarcerated during the twenty-four hour period following his arrest on June 27, 2007. By arguing he was physically unable to notify his probation officer of his arrest within twenty-four hours, he asserts we should reverse the trial court's finding that Minzey violated the terms of his probation. Again, we disagree. Minzey never notified his probation officer of the arrest, within twenty-four hours or otherwise. Despite that, the evidence is overwhelming that Minzey violated the terms of his probation. He drank intoxicating beverages, he drove on a forfeited license, and he gave a false name to police when arrested.

II. Sentence

Minzey next argues that the trial court abused its discretion in ordering him to serve the remainder of his sentence. The grant of probation or conditional release is a favor granted by the State, not a right to which a criminal defendant is entitled. Sanders v. State, 825 N.E.2d 952, 955 (Ind. Ct. App. 2005), trans. denied. "We review a trial court's sentencing decision in a probation revocation proceeding for an abuse of discretion." Carneal v. State, 859 N.E.2d 1255, 1257 (Ind. Ct. App. 2007), trans. denied. An abuse of discretion occurs if the decision is against the logic and effect of the facts and circumstances before the court. Whatley v. State, 847, N.E.2d 1007, 1009 (Ind. Ct. App. 2006). Indiana Code Section 35-38-2-3(g)(3) provides: "If the court finds that the person

has violated a condition at any time before termination of the period, and the petition to revoke is filed within the probationary period, the court may impose . . . all or part of the sentence that was suspended at the time of initial sentencing.”

We conclude the trial court did not abuse its discretion when it ordered Minzey to serve his entire suspended sentence. He was shown leniency when he was sentenced to forty days for his first probation revocation. He was arrested for a new charge one week after his first probation revocation hearing, and before he was due to report to the Department of Correction. Minzey’s arguments are without merit.

Conclusion

There is sufficient evidence to demonstrate Minzey was on probation at the time of his arrest and that the trial court did not abuse its discretion in revoking Minzey’s probation. Additionally, the trial court did not abuse its discretion by imposing the entire sentence that was suspended at the time of initial sentencing. We affirm the trial court in all respects.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.